Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000381-001 DT 11/19/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

ELCHE L L C

v.

GLEN ALLAN WOODFORD (001)

BRIAN A PARTRIDGE

GLEN ALLAN WOODFORD
1015 N 1ST ST
PHOENIX AZ 85004

DOWNTOWN JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2011–208858.

Plaintiff Appellant Elche LLC (Plaintiff) appeals the Downtown Justice Court's determination altering Plaintiff's Judgment to (1) provide Plaintiff would receive no prejudgment interest on the debt; and (2) lower the post-judgment interest to 4.25%. Plaintiff contends the trial court erred. For the reasons stated below, the court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

On, May 19, 2005, Defendant entered a contract with Juniper Bank[1]—Plaintiff's predecessor in interest—providing Juniper Bank would extend credit for Defendant's purchases and Defendant would repay the debt with interest and other fees as specified by the contract. Defendant failed to make payments on this obligation to Juniper Bank, and made his last payment on January 22, 2007. The principal balance remaining unpaid was $2,422.56 plus interest. The bank charged off the debt on, September 26, 2007, and then sold the account to Marshall Recovery LLC. who sold the account to Plaintiff on July 18, 2011.[2]

Plaintiff filed suit on October 18, 2011. Defendant was personally served on October 28, 2011, but defaulted. Plaintiff requested judgment on the principal amount plus prejudgment

[1] Plaintiff admits Defendant did not sign a written contract but argued complete performance by one party satisfies the need for a signed writing. Additionally, Defendant did not raise a Statute of Frauds defense.
[2] Affidavit of Victor Gilgan, Manager of Elche, LLC. Dated February 3, 2012.

interest, attorneys' fees, and post-judgment interest at 18%. The trial court granted judgment on March 20, 2012, but altered the judgment and (1) struck the attorneys' fees; (2) struck the "past accrued" interest; and (3) altered the post-judgment interest to 4.25% from the requested 18%.[3]

Plaintiff filed a timely appeal. Defendant failed to file a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did The Trial Court Err By Awarding Post Judgment Interest At The 4.25% Rate.

Standard of Review

Contract interpretation is a question of law. As such, contract interpretation issues are reviewed *de novo*. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 218 P.3d 1045 ¶¶ 8–9 (Ct. App. 2009); *Bennett v. Baxter Group, Inc*. 223 Ariz. 414, 224 P.3d 230 ¶ 12 (Ct. App. 2010). In reviewing the contract, this Court will construe the contract as a whole *Bennett v. Baxter, id*, at ¶ 15.

Interest on Judgment

A.R.S. § 44–1201(A) states that interest on a judgment based on a written agreement shall be at the rate of interest provided in the agreement.

> Interest on any loan, indebtedness or other obligation shall be at the rate of ten percent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to. Interest on any judgment that is based on a written agreement evidencing a loan, indebtedness or obligation that bears a rate of interest not in excess of the maximum permitted by law shall be at the rate of interest provided in the agreement and shall be specified in the judgment.

Here, Plaintiff alleged there was (1) a written Cardmember Agreement; (2) a remaining balance on the agreement; and (3) the amount due allowed for interest at or greater than 18.00%. Defendant defaulted and Plaintiff submitted a Motion For Entry Of Judgment Without Hearing pursuant to Rule 55(b)(1) A.R.C.P. Plaintiff attached Exhibit 2—a copy of the Cardmember agreement—as well as an affidavit—Exhibit 1— from one of Plaintiff's managers to the Motion For Entry Of Judgment Without Hearing. The manager's affidavit established Defendant last paid his account on February 22, 2007, and Plaintiff's predecessor in interest charged the account

[3] The Judgment provided "interest accrues on the Balance at the rate of 18.00% per annum from 9/26/2007 until paid at the rate contracted for in writing. Interest accrues on costs and fees at the rate of 4.25% per annum from the date of judgment until paid, pursuant to A.R.S. 44–1201(B)." [sic]. Although the trial court did not strike any of this provision, the trial court added the following language: "Without proof of debt, atty. [sic] fees, & past accrued Int., of any kind, is denied. Judgment is granted and Int. accrues @ 4.25% from today until pd. In full."[sic]

off on September 26, 2007. This affidavit also asserted interest accrued at a rate greater than 18%. The Cardmember agreement indicated how finance charges and other fees would be assessed.

The trial court signed the Judgment. In the Judgment—and in the earlier Complaint—Plaintiff specifically requested interest at the rate of 18%. Defendant had a written agreement with Plaintiff's predecessor in interest listing an interest rate greater than 18%. Nonetheless, the trial court sua sponte struck the requested interest rate from the proposed Judgment. In so doing, the trial court erred. Defendant was specifically notified of the requested interest rate. A.R.S. § 44–1205(C) provides the holder or issuer of a credit card revolving account may charge interest provided the interest does not exceed the maximum rate set by the contract. Here, Plaintiff demonstrated the agreement provided for interest greater than 18%. Plaintiff requested interest at the 18% rate. This rate did not exceed the "maximum rate set by the contract." Additionally, A.R.S. § 44–1201(A) uses the term "shall" which generally indicates mandatory language. *See HCZ Const. Inc. v. First Franklin Financial Corp.*, 199 Ariz. 361, 18 P.3d 155 ¶ 11 (Ct. App. 2001); and *State v. Rogers*, 227 Ariz. 55, 251 P.3d 1042 ¶ 6 (Ct. App. 2010). Because (1) the statute provides for a rate of interest agreed to by the parties; and (2) Plaintiff's evidence established an interest rate in excess of 18%, the trial court erred in sua sponte reducing the requested interest amount to 4.25%.

Attorneys' Fees For The Underlying Judgment

Plaintiff requested attorneys' fees in its Complaint. After receiving a default judgment, Plaintiff requested attorneys' fees for its prosecution of the underlying lawsuit. Defendant was apprised of this request and did not oppose it. The trial court, however, determined Plaintiff was not entitled to any award for attorneys' fees saying these fees were denied because there was no proof of a debt. In so doing, the trial court erred. Plaintiff provided proof of the debt by including a copy of the credit card agreement as well as an affidavit from Elche LLC's manager—Victor Gilgan—attesting Elche LLC purchased Defendants' debt—and all rights related to that debt—from Juniper Bank. According to Mr. Gilgan, the credit card agreement specifically provided for attorneys' fee as well as an interest rate greater than 18.00%. Defendant did not deny he was indebted to Plaintiff.

A. Is Plaintiff Entitled To Attorneys' Fees For The Appeal.

Plaintiff requested attorney fees for the charges it incurred in presenting this appeal. At the outset, this Court notes that Plaintiff's appellate issue did not arise because of Defendant's conduct. Defendant did not appear in the underlying trial court action and did not oppose any of Plaintiff's requests—either at the trial court or the appellate court level. Therefore, it is incumbent on this Court to evaluate Plaintiff's request in light of equity as well as based on any underlying contractual or statutory provision.

Plaintiff has provided this Court with no authority or argument indicating why it believes it is entitled to attorney fees in this action. Attorney fees based on contract actions arise because of (1) a contractual provision or (2) A.R.S. § 12–341.01. This Court notes that in Plaintiff's complaint, Plaintiff requested "reasonable" attorney fees and other relief "as justice requires." This Court believes it would be manifestly unjust to award attorney fees for the costs of the appeal in a situation where the Defendant did not oppose either Plaintiff's original claim or Plaintiff's appeal. Plaintiff's entire claim arose because the trial court—sua sponte—reduced Plaintiff's post-judgment interest rate on its judgment. Defendant did not request this action and should not be responsible for any costs emanating from it.

This Court notes that any award of attorney fees under A.R.S. 12–341.01 is subject to an analysis about the reasons for the shifting of responsibility for fees. Our Arizona Supreme Court has discussed the factors a court should consider prior to making an award. These include:

1. whether the unsuccessful party's position or defense had merit;
2. whether the litigation could have been avoided, or settled and how the successful party's efforts influenced the result;
3. whether assessing fees against the unsuccessful party would cause extreme hardship;
4. whether the successful party prevailed with respect to all of the relief sought;
5. whether the legal question was novel;
6. whether a similar claim had been previously adjudicated in this jurisdiction;
7. whether the particular award would discourage other parties with tenable claims or defenses from litigating or defending for fear of incurring liability for substantial amounts of attorney fees.

Assoc. Indem. Corp. v. Warner, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985); *Moedt v. General Motors Corp*., 204 Ariz. 100, 60 P.3d 240 ¶ 19 (Ct. App. 2003). In establishing these factors, the Arizona Supreme Court considered the language of A.R.S. 12–341.01 and cited subsection B which states the award

> . . . should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney's fees actually paid or contracted. . . .

Assoc. Indem. Corp. v. Warner, 143 Ariz. at 569, 694 P.2d at 1183. In this case, while Plaintiff prevailed on its legal argument it provided no authority indicating why it believes Defendant should be responsible for any fee shifting. Plaintiff is a company engaged in the business of purchasing credit card debt while Defendant is an individual. Defendant did not request—and did nothing to encourage—the trial court's action. Defendant did not oppose Plaintiff's claim and did

not challenge Plaintiff's proposed judgment. Defendant did not file any responsive appellate memorandum. Because Defendant did not oppose Plaintiff's claim or appeal this Court finds it would be inappropriate to charge Defendant with the costs of Plaintiff's appeal and declines to do so.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Downtown Justice Court erred in altering the interest amount in the judgment and in denying attorneys' fees for the default judgment.

IT IS THEREFORE ORDERED reversing the judgment of the Downtown Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Downtown Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 111920121330